to have been made under the Emergency (Essential Powers) Ordinance, 1969, (hereinafter in this Act referred to as "the Ordinance") on or after February 20, 1971, shall be valid and have effect as if the said subsidiary legislation has been made under the appropriate provision of this Act and shall be deemed to have come into force from the date on which the subsidiary legislation came into force or purported to have come into force under the Ordinance, and shall be read with all such modifications as may be necessary to construe such subsidiary legislation as having been made under this Act."

It is clear that the expression "every subsidiary legislation" in section 9(1) of the Act is not intended to include a general species, but limited to a particular kind. This expression is amply qualified by the words "whatsoever made or purporting to have been made under the Emergency (Essential Powers) Ordinance, 1969 on or after February 20, 1971." This qualifying phrase clearly shows that Parliament did not intend to import the definition of "subsidiary legislation" in the Interpretation Act into the section. The qualifying phrase refers to all regulations which purported to have been made under the Emergency (Essential Powers) Ordinance, 1969 being regulations which were struck down by the Privy Council in *Teh Cheng Poh's* case.[2] These regulations must necessarily include the Essential Security Cases Regulations which are therefore validated by section 9(1) of the Act. There is no question as to the power of Parliament to pass a validating Act, as this is succintly stated by the Lord President in *Teh Cheng Poh* v. *Public Prosecutor*[2] as follows:—

"The regulations having been ruled to be *ultra vires*, it is open to Parliament to validate them and further, to validate them with retrospective effect. With respect, we agree with the [following] statement of the Indian Supreme Court at page 908 in *Rai Ramkrishna* v. *The State of Bihar* [1964] 1 S.C.R. 897:"

We therefore feel that no more attempt should be made by counsel to raise the point in other High Courts.

In our view, there is no merit in the point raised and hence we dismiss the appeal.

Appeal dismissed.

Solicitors: *Subash Chandran.*

ALWEE v. LAI KONG FOOK & ORS.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Salleh Abas F.JJ.) April 1, 1981]

[Ipoh — Federal Court Civil Appeal No. 130 of 1980]

Practice and Procedure — Appeal — Appeal on question of facts. — Application for amendment of statement of claim.

In this case the appellant appealed against the decision of the High Court reported in [1980] 2 M.L.J. 258. The appeal was on facts but at the hearing of the appeal the appellant also applied to amend the statement of claim.

Held: (1) as the findings of the learned trial judge were of pure facts, the Federal Court ought not to differ;

(2) the appellant could not hope to succeed even if the amendments were allowed, and for that reason the application to amend the statement of claim must be refused.

Cases referred to:-

(1) *Ong Chat Pang & Anor.* v. *Valliappa* [1971] 1 M.L.J. 224.

(2) *Oh Hiam & Ors.* v. *Tham Kong* [1980] 2 M.L.J. 159.

(3) *Chow Yee Wah* v. *Choo Ah Pat* [1978] 2 M.L.J. 41.

(4) *S. Soonaratnam & Anor.* v. *S. Ramalingam* [1981] 1 M.L.J. 24.

(5) *Tindok Besar Estate Sdn. Bhd.* v. *Tinjar Co.* [1979] 2 M.L.J. 229.

(6) *Curran* v. *William Neill & Sons (St. Helens) Ltd.* [1961] 3 All E.R. 108.

FEDERAL COURT.

J.R. Devadas (*Paramjit Singh* with him) for the appellant.

Colin Clark for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is from the dismissal by the High Court at Ipoh (Abdoolcader J.) of a claim for specific performance of an oral agreement of sale of a house which the appellant was at all relevant times occupying as a tenant of the 1st and 2nd respondents (the houseowners).

The issues raised were clearly issues of pure facts and indeed, the appellant's then counsel in framing the issues in the case admitted so. In his view, with which the defendants' counsel and the court agreed, the appellant must establish, on a balance of probabilities, the existence of an oral agreement of sale which is legally binding on the parties and since the premises had been sold, whether the 3rd defendant, the subsequent purchaser of the premises, had notice of prior sale to the appellant. Counsel conceded that if he failed to establish the existence of the oral agreement of sale, the appellant would lose his whole case.

The allegations on which the appellant based his claim were given in his statement of claim as the payment of a deposit of $1000 during 1973, in consideration of the houseowners' agreement to sell the premises to him for $46,000. He did not allege any date set for completion. In consideration of this promise, he expended some $50,000 on the premises for the business of a restaurant and coffee-shop. In May 1976, he learnt from the 3rd respondent that the houseowners were about to sell the premises to him. He then advised the intended purchaser of his prior claim. When the houseowners notified him of this sale in August 1976, he took action. He claimed he was ready able and willing to complete, but he did not say when.

His statement of claim stood unamended at all times. No further and better particulars were sought from him, but in taking advantage of the vagueness of his statement of claim to roam at large, he fell into the not unusual error of departing seriously from his pleadings, when he came to give evidence, with serious consequences to his credibility.

If we do not now refer to the evidence in any detail, it is only because the trial judge had done so in as detailed and critical examination of the entire case as it has been our pleasure to read. But briefly, the trial judge found that the appellant had repeatedly changed his evidence as to the dates of the tenancy or of the offer to sell the premises to him, whether the oral agreement to sell the premises to him was made with the houseowners or with one Ah Pin and whether the renovations to the premises were made before or after the agreement to sell. The trial judge

also noted the uncertainty about the receipt for the deposit of $1000 alleged to have been paid and observed that this receipt now said to have been conveniently lost was never mentioned in the appellant's affidavit of documents as having been previously in his possession. The trial judge thought, in our view, entirely correctly, that the onus of establishing the part played by Ah Pin which the appellant relied on in proof of the oral agreement of sale was on the appellant and his failure to call Ah Pin raised an adverse inference against him, under the provisions of section 114(g) Evidence Act 1950. As too, his failure to obtain the evidence *de bene esse* or on commission of one Mohamed whom he said was present when he was asked by the 1st respondent whether he wished to buy the premises and he had replied he did, and who had gone to India. The appellant also conceded that he had at no time the means to complete.

The trial judge heard the appellant and his witnesses with patience and after a detailed analysis of their evidence, he was of the opinion that the appellant was as evasive and unreliable a witness as one could find and his two witnesses were no better.

By contrast, he found the houseowners reliable witnesses and he accepted their evidence as well as that of the 3rd respondent, that no offer was ever made to sell the premises to the appellant, no authority was given for the renovations and no advice was given to the appellant of the proposed sale to the 3rd respondent.

The submissions to him were only on the evidence, with one exception, a reference to section 26 of the Specific Relief Act, 1950 and *Ong Chat Pang & Anor.* v. *Valliappa*[1] which is a case dealing with the principle of a *bona fide* purchaser for value without notice of an earlier contract and which, coming from counsel for the appellant, could only be relevant if he had first established the prior contract. The trial judge treated the case, therefore, as he was advised by counsel to do so, almost entirely as a case involving evidence and the proof of facts. On the whole of the evidence, he was of the opinion that the appellant had failed to establish any oral agreement of sale or the payment of the deposit of $1000. His findings are therefore of pure facts.

In such circumstances, it ought not to be and it is not the practice of this court as an appellate court, to differ. We must heed what Lord Russell of Killowen said in *Oh Hiam (f) & Ors.* v. *Tham Kong*[2]:

"...The Federal Court... sought to analyse the Notes of Evidence, arriving at a diametrically opposite view to that taken by the trial judge on which evidence should be accepted. This approach in an appellate court is on general principle very rarely acceptable, as has more than once been said by the Board, notably recently in *Chow Yee Wah* v. *Choo Ah Pat.*"[3]

We did so, among others, in *S. Soonaratnam & Anor.* v. *S. Ramalingam.*[4]

It is perhaps in the realisation that we will refuse to differ from the trial judge, especially where there is, as in this case, an abundance of evidence on a critical analysis thereof, for the findings, that Mr. J.R. Devadas, who appeared as counsel at the appeal, prefaced his appeal with a motion to amend the statement of claim. We heard Mr. Devadas at length but very obviously, the terms of the amendment merely sought to comply with the rules of pleadings and to avoid the criticism of the evidence departing from the pleadings but they could not and did not explain the numerous variations and resilements in the appellant's oral evidence which branded him in the view of the trial judge as a totally unreliable witness. The appellant could not therefore hope to succeed on these amendments, if allowed, and for this reason, the motion must be and was refused: *Tindok Besar Estate Sdn. Bhd.* v. *Tinjar Co.*,[5] following *Curran* v. *William Neill & Sons (St. Helens) Ltd.*[6] We observed, not without interest that Mr. Devadas pleaded, in as many words, for a new trial. That was obviously the real purpose for the amendments sought, but nothing is clearer than that the appellant should not be given a further chance to prevaricate.

We had no difficulty in dismissing the appeal and we did so, without calling on counsel for the respondents to reply. The appellant was ordered to pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Paramjit Singh & Co.; Concisom & Clark.*

OVERSEA-CHINESE BANKING CORPN. LTD. v. PHILLIP WEE

[O.C.J. (Mohamed Zahir J.) January 23-24 & March 8, 1980]
[Kota Bharu — Civil Suit No. 95 of 1975]

Limitation — Overdraft facilities — Claim for payment of balance — Whether statute-barred — Revival of cause of action by subsequent promise to pay.

Banking — Overdraft facilities — Claim for payment of balance — Whether claim statute-barred — Revival of cause of action by subsequent promise to pay.

The plaintiff in this case sued the defendant for $44,250.72 being the amount due and payable to the plaintiff on a current account. The defendant was on or about October 2, 1963 granted overdraft facilities by the plaintiff and the amount then granted to the defendant was up to $25,000. The account became dormant since 1965 and interest at 10.8% per annum began to accumulate. The overdraft was secured by a charge executed by the defendant's father, since deceased, of a piece of land up to the limit of $25,000 and interest.

The present claim, which was commenced on June 15, 1975, was for the balance of the amount due after deducting the amount due from the estate of the defendant's father, the guarantor.

The issue before the court was whether the plaintiff's claim was statute-barred. A letter dated January 14, 1974 was written by the defendant addressed to the plaintiff's solicitors requesting "for a postponement of the application to a date sometime in the middle of March 1974 so as to enable (him) to raise as initial payment to O.C.B.C. Ltd., Kota Bharu a sum of about $25,000."

Held, allowing the plaintiff's claim: (1) the defendant's letter dated January 14, 1974 revived the time for suing by the plaintiff and started time to run afresh;

(2) all that is necessary for an acknowledgement which takes the case out of the statute is that the debtor should recognise the existence of the debt, or that the person who might rely on the statute should recognise the rights against himself;

(3) the acknowledgment need not even contain a promise to pay and it is immaterial that the amount of the debt is